3-26-1976

Gwendolyn Dale Cherry v. Gary E. Cherry

Appellant's Brief 1976-SC-0203

APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-203

GWENDOLYN DALE CHERRY - - Appellant

versus

GARY E. CHERRY - - - - - Appellee

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS W. HINES, JUDGE

BRIEF FOR APPELLANT

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This is to certify that a copy of this Brief has been served on Mr. David F. Broderick, Cole, Harned & Broderick, 1033 State Street, Bowling Green, Ky. 42101; Hon. Thomas W. Hines, Judge, then presiding, and Hon. J. David Francis, presently presiding, Warren Circuit Court, Division II, Warren County Courthouse, Bowling Green, Ky. 42101, pursuant to RAP 1.250.

This 25th day of March, 1976.

S. Frank Smith, Jr.
Of Counsel for Appellant, Gwendolyn Dale Cherry

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II. Was the Court's modification of the custody decree made within two years of the date of the decree, without supporting affidavits and without any evidence of a change in circumstances since the original decree and subsequent modification, contrary to KRS 403.340 and KRS 403.350?

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SUPREME COURT OF KENTUCKY

File No. 76-203

GWENDOLYN DALE CHERRY - - - *Appellant*

v.

GARY E. CHERRY - - - - - *Appellee*

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS W. HINES, JUDGE

BRIEF FOR APPELLANT

May it please the Court:

STATEMENT OF THE CASE

A. Statement of the Nature of the Proceedings

This is an appeal from the Warren Circuit Court, Division II, Thomas W. Hines, then presiding. The marriage of the appellant, Gwendolyn Dale Cherry, and the appellee, Gary E. Cherry, was dissolved by the Court on July 30, 1974 (TR 33-36). The appellee moved to change custody of the child, Alex, on March 26, 1975 (TR 46). As a consequence of this motion, the Court ordered the Kentucky Department of Child Welfare (Department of Human Resources) to investi-

gate the home of the appellee and the Florida Department of Child Welfare to investigate the home of the appellant and report to the Court (TR 51).

The Kentucky investigation is not of record and, therefore, presumably was never made. The Florida investigation of the home provided by the appellant was placed of record on June 18, 1975 (TR 63-64).

On May 12, 1975, appellee moved for a full hearing as to the fitness of the appellant as the proper person to have custody of Alex (TR 60).

On June 20, 1975, the hearing was conducted relative to the custody provisions of the decree and both parties agreed to extend the visitation periods for the appellee at his expense, and an Order was entered on June 27, to this effect (TR 66-67).

In October, 1975, appellee once again moved for a change in custody.

On November 12, 1975, the Court modified the custody decree (TR 69). On November 19, 1975 and November 24, 1975, the appellant moved the Court to vacate its Order (TR 70 and 72).

The Court overruled the Motion on December 22, 1975 (TR 81).

The appellant filed her Notice of Appeal on December 29, 1975 (TR 147).

It is from the Order overruling the Motion to Vacate the Judgment and getting to the heart of the matter, the Order of November 12, 1975 whereby the Court modified the custody of Alex, that the appellant appeals to the Supreme Court of Kentucky.

B. Statement of the Facts

The following facts are set forth in a concise chronological statement in narrative form consisting of the essential facts necessary to determine the question in controversy.

The parties were married on November 13, 1971, and their marriage was dissolved July 30, 1974. There was one infant child, Alex Lee Cherry, born of this marriage on June 13, 1972.

The Order of July 30, 1974, dissolving the marriage gave custody to the appellant with the appellee having the child with him twice yearly for periods of forty-five days each (TR 34).

The appellant wishes to call the *Court's* attention to the fact that the Trial Court knew that the appellant and Alex were in Florida as of July 30, 1974. The Order recites, "Therefore, respondent shall have reasonable visitation rights with said child in Florida where the mother now resides" (TR 36).

Trial Court insisted throughout the proceedings that the appellant moved out of the jurisdiction without the knowledge of the Court; and this erroneous thought obviously prejudiced him against the appellant (TR 86-129-139-141-144).

Between the Order of July, 1974 and the first motion to modify the custody decree made in May, 1975, there is a constant quarrel between the appellant and appellee as to non-payment of child support and not allowing visitation privileges (TR 37-47).

As a result of the May, 1975 hearing, the Court ordered a full hearing on the custody matter to be held on June 20, 1975, after investigations by Kentucky and Florida agencies (TR 61).

On June 18, 1975, the Report of the Florida Division of Family Services addressed to the Court was filed (TR 63-64). Apparently, the last paragraph of the report went unheeded by Trial Court—"We believe that Gwendolyn Dale Cherry is a fit and proper person to continue to have custody of her son" (TR 64).

At the hearing of June 20, 1975, appellant being afraid of the unknown and unpredictable direction of the Court, agreed to an order increasing appellee's visitation rights to two more visitation periods of fifteen days each with expenses of transportation assessed to appellee (TR 66-67).

On October 17, 1975, appellee moved once again for change of child custody based on "Petitioner has failed to properly provide for the infant child of the marriage and has not complied with the previous orders of this Court" (TR 68).

At the hearing, the Court began taking testimony from the appellee and appellee's mother. Counsel for appellant objected to the proceedings for lack of any affidavits served with the Motion (TR 84) and asked the Court to allow attorney's fees and costs under KRS 403.340 for vexatious and harassing motions (TR 84).

The appellee testified that since the modification of custody in June and the Report of the Florida Department of Family Divisions, he knew of no change in

circumstances in the health, care, and welfare of the child:

> "Q. 98. Ok. So you're telling the Court that you know of no changes in the home of that child since June?
>
> A. Yes sir" (TR 113).

Further, while appellant questions any relevancy as to the custody proceedings and the well being of the child, the appellee further admits:

> "Q. 76. So, today you are telling the Court that your former wife has not broken any Court Order since June of this year. She has not denied you visitation of that son . . . of your son?
>
> A. Not since June" (TR 106).

During the hearing, the appellee never offers any proof that appellant did not properly care for Alex. The hearing proceeds, and testimony is given by the appellee's mother, and the driving force behind all of the motions becomes apparent.

> "Q. 40. But right now, until that time then, you will raise the child, and not Gary, until Gary can provide a home to give the child?
>
> A. I'll raise the child. Gary will support the child, and I will take care of it.
>
> Q. 41. Does this mean, like, you'll take care of the child 24 hours a day?—and the child will stay with you?
>
> A. I will. When the child is with us, Gary spends a lots of nights at our house, and he spends the evening at our house with the child.
>
> * * * * * * *

Q. 45. As a matter of fact, you intend to take care of the child until Gary remarries, is that correct?

A. Yes, the child will be in my home" (TR 129-132).

She further testifies that since the last modification of the custody decree, she knows of no change in the circumstances of the home of the child (TR 135).

At the end of the hearing the Court left with:

"You gentlemen, just call me and let me know when you want to come back. Let's work this out, now on a more equitable basis" (TR 145).

And the next act by the Court was to change the custody of the child from the mother, with the appellee having the child two 45-day periods, plus two 15-day periods during the year, to joint custody with each party to have the child every two months (TR 69).

This order was signed November 12, 1975, and the appellant did not know of this Order until November 17, 1975 (TR 71).

So, it is obvious throughout this mistrial of justice that Trial Court looked in the other direction from the statutory, moral, and humane consideration in modifying the custody decree within two years of the original decree.

ARGUMENT

I. The Modification Versus the Best Interest of the Child

The cases are legion and there is no dispute that the best interests of the child is controlling over all other considerations in custody matters. *McNamee* v. *McNamee,* Ky., 432 S. W. 2d 818. However, it is deemed in the best interest of the child for the mother to have custody unless she is a person of unfit character or cannot provide a suitable home. *Liles* v. *Liles,* Ky., 432 S. W. 2d 814.

Therefore, by law, the appellant does not have to show that she is the fit person to have custody of Alex (even though the Report of the Florida Division of Family Services is enough proof in her favor (TR 63-64). It is the burden of the appellee to show she is unfit.

Now, where is the proof? There is never any believable or admissible evidence before the trial court that the appellant is unfit to have the custody and care of her infant son, Alex. Not since the modification in June, 1975—not since the Dissolution in July, 1974—not ever.

With children of tender age, the law generally favors the mother in determining custody. *Whisman* v. *Whisman,* Ky., 401 S. W. 2d 583. With a child of three, the best interest and welfare of this child demand that divided custody between divorced parents alternately be avoided, if possible; and such custody will not be approved, except under exceptional circumstances

or for strong and convincing reasons. *McLemore* v. *McLemore,* Ky., 346 S. W. 2d 722.

It would seem inconceivable that Alex's best interests would be served by having the three-year old traipsing back and forth from Florida to Kentucky every two months, not knowing a permanent home, a stable home, nor a permanent mother.

Trial Court has done in earnest what King Solomon did facetiously. He divided the child in half. What better way to raise a maladjusted, malcontented misfit?

II. Was the Modification of Custody in November, 1975 Contrary to KRS 403.340 and KRS 403.350?

There are not many ways to construe KRS 403.340(1).

> "(1) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the Court permits it to be made on the basis of *affidavits* that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health."

The Statute says affidavits—plural. The October Motion of the appellee (TR 68) has zero affidavits.

KRS 403.340(2) provides another avenue for the Court to modify the prior decree. Likewise, the Order of November 12, 1975 does not come under the roof of this section.

If the Trial Court had merely taken the time to read KRS 403.340, he would have known that the divisions

of the child per his order was contrary to statute, notwithstanding it being against the best interest of Alex.

Further, under KRS 403.350 the Motion of October to modify the custody decree should have been denied.

> "A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification. . . . The Court shall deny the motion, unless it finds that adequate cause for hearing the motion is established by the affidavits. . . ."

Here there was not one affidavit (TR 68), and the motions should have been denied as KRS 403.350 clearly states. This proposition is clearly controlled by *Robbins* v. *King*, Ky., 519 S. W. 2d 839.

III. Did the Court Err in Denying Attorney's Fees and Costs Under KRS 403.340?

KRS 403.340(3) provides:

> "Attorney fees and costs shall be assessed against a party seeking modification if the Court finds that the modification is vexatious and constitutes harassment."

The appellant asked for attorney fees and costs at the October hearing (TR 84), as well as in her Amended Motion to Vacate Judgment (TR 72).

Looking at the sequence of events and the confessed motive of the appellee and his mother (TR 129-132) the motion of October to modify custody would appear to come under the purview of KRS 403.340(3).

Divorce and Custody Decree, July, 1974 (TR 33-36).

Motion by appellee to change child custody, March, 1975 (TR 46).

Motion by appellee to extend visitation privileges in May, 1975 (TR 60).

Motion by appellee for hearing on change of child custody in June, 1975 (TR 65).

Motion by Appellee on change of child custody in October, 1975 (TR 68).

Certainly, the trend was set. Each motion required the appellant to expend monies for attorneys, disrupt her life with the child and put the child through a grueling pace. Not to mention the disastrous effect on the appellant's working status.

Taking into consideration the closeness in time of the motions to the original decree, the number of motions made to modify, the motives behind them, the unsettling effect on Alex, the disruption of the life of the appellant and the failure to adhere to the statutory requirements, coupled with lack of cause for such motions, the conclusion constitutes vexations action and harassment.

Apparently the only thing that stopped the next motion to modify was this appeal.

IV. Modifying the Custody Decree Ex Parte

Other than KRS 403.340 and 403.350 setting out the only method of modification, the Trial Court denied the appellant her constitutional right to Due Process. *U.S. Const. Amend. V, U. S. Const. Amend. XIV, sec. 1.*

The Trial Court ended the hearing of October, telling counsel for both parties to call him and let him know when counsel wanted to come back (TR 145).

Counsel for appellee wrote counsel for appellant on November 6, 1975 attaching a copy of the appellee's proposed Order and closed

> "so we might try, if it is humanly possible, to have a hearing before Judge Hines" (TR 77).

Counsel for appellant wrote on November 10, 1975, enclosing a copy of the appellant's desired order and in which he stated

> ". . . which I will tender at the same time yours will be tendered.
>
> If you can locate the Judge, I will be glad to have a hearing" (TR 79).

The next order of business was when the Trial Court entered, on November 12, 1975, the appellee's tendered order; and the appellant's counsel first became aware of the order on November 17, (TR 71).

The Court decided the matter without a full hearing, thus denying appellant due process under our Constitution. U. S. Const., *supra.*

CONCLUSION

When all the smoke clears, one thing is obvious. The Trial Court has ordered a three and one-half year old to spend two months in Kentucky and two months in Florida. While this idea would be appealing to some people, the burden placed on the mother-appellant and

most of all the effect on the child, to say the least, is detrimental.

For reasons, as set forth in this brief, the appellant submits to this Court that Trial Court erred in its order overruling the Motion and Amended Motion to Vacate and the Order of November 12, 1975, wherein appellee was given joint custody and the child alternated between parents every two months.

Further, Trial Court should have allowed appellant attorney's fees for the vexatious and harassing motions of the appellee.

Respectfully submitted,

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